

WYOMING OUTDOOR COUNCIL  
JAMES M. WALSH

IBLA 99-37 and 99-38

Decided July 25, 2003

Appeals from three decisions of the State Director, Wyoming, Bureau of Land Management, dismissing protests to decisions proposing to offer Federal lands within a National Forest for competitive oil and gas leasing. WY-9806-381, et al.

Walsh appeal dismissed; decisions affirmed.

1. Environmental Quality: Environmental Statements--  
Mineral Leasing Act: Environment--National  
Environmental Policy Act of 1969: Environmental  
Statements--Oil and Gas Leases: Discretion to Lease

This Board has no jurisdiction over decisions made by the Forest Service. However, when BLM adopts the FEIS of another agency in lieu of performing its own environmental analysis and relies on it as the basis for an exercise of its own decisionmaking authority, this Board properly may review that FEIS to determine whether BLM's decision is supported by the record, guided by the same principles ordinarily applicable to an FEIS prepared by BLM.

2. Administrative Practice--Administrative Procedure:  
Administrative Review--Appeals: Jurisdiction--Board of  
Land Appeals--Delegation of Authority--Endangered  
Species Act of 1973: Generally--Endangered Species Act  
of 1973: Section 7: Consultation--Fish and Wildlife  
Service--Office of Hearings and Appeals--Rules of Practice:  
Appeals: Jurisdiction

Under the Endangered Species Act (ESA), BLM is obligated to ensure that an authorized action is not likely

to jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of its habitat. The Act imposes the same obligation for species that have been proposed for listing. Compliance with the ESA is also an element of complying with NEPA. In evaluating whether BLM took the requisite “hard look” at the environmental impacts of a proposed action that NEPA requires, the Board properly considers whether BLM considered the potential impacts on listed or proposed species or their habitat that the ESA mandates. However, the Board lacks jurisdiction to review the merits of a biological opinion issued by the U.S. Fish and Wildlife Service as a result of formal consultation regarding a species, which opinion serves, in part, as a basis for BLM's decisionmaking.

3. Environmental Quality: Environmental Statements--  
Mineral Leasing Act: Environment--National  
Environmental Policy Act of 1969: Environmental  
Statements--Oil and Gas Leases: Discretion to Lease

BLM is required to consider the potential cumulative impacts of a proposed action with those of any other past, present, and reasonably foreseeable future actions.  
40 CFR 1508.7. Where appellant has failed to explicitly identify any cumulative impact likely to result from the interaction of oil and gas exploration and development with other projects or activities that was not addressed in the EIS, there is no violation of NEPA.

4. Endangered Species Act of 1973: Generally--Endangered  
Species Act of 1973: Section 7: Consultation--Fish and  
Wildlife Service

Where BLM held an oil and gas lease sale prior to the date a species was proposed for listing under the ESA, there was no obligation to confer with USFWS before conducting the sale.

5. Endangered Species Act of 1973: Generally

Under section 6840 of the BLM Manual, BLM is required to carry out management for the conservation of

candidate species and to ensure that its actions do not contribute to the need to list such species as threatened or endangered. BLM is required to request technical assistance on any planned action that may contribute to the need to list a candidate species.

6. Environmental Quality: Environmental Statements--  
Mineral Leasing Act: Environment--National  
Environmental Policy Act of 1969: Environmental  
Statements--Oil and Gas Leases: Discretion to Lease

Where BLM issued a "Letter of Review and Acceptance" by which it adopted a Forest Service FEIS and ROD and the record demonstrates that BLM actively and extensively participated in its preparation as a cooperating agency, and had also prepared two earlier EIS's considering the impacts of oil and gas leasing for an area that included the Shoshone National Forest, the Board properly may look beyond the style and format of the adoption document to consider its substantive content and effect.

7. Environmental Quality: Environmental Statements--  
Mineral Leasing Act: Environment--National  
Environmental Policy Act of 1969: Environmental  
Statements--Oil and Gas Leases: Discretion to Lease

Until a public record of decision is issued, an agency is prohibited from taking an action concerning a proposal which would either have an adverse environmental impact or limit the choice of reasonable alternatives. Although BLM's Letter of Review and Acceptance had not been issued when BLM decided to offer the parcels for leasing or when the lease sales were conducted, these actions did not constitute actions which would either have an adverse environmental impact or limit the choice of reasonable alternatives.

APPEARANCES: Caroline Byrd, Esq., and Dan Heilig, Esq., Wyoming Outdoor Council, Lander, Wyoming, for the Wyoming Outdoor Council; James M. Walsh, pro se; Andrea S.V. Gelfuso, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE PRICE

The Wyoming Outdoor Council (WOC) and James M. Walsh have separately appealed from decisions of the State Director, Wyoming, Bureau of Land Management (BLM), dated September 3, and 4, 1998, respectively, dismissing their protests of BLM decisions proposing to offer for competitive oil and gas leasing six parcels of Federal land totaling 6,297.39 acres situated in Park and Fremont Counties in Wyoming, within the Shoshone National Forest (SNF), at its June and August 1998 sales.<sup>1/</sup> BLM had proposed to offer these and other lands for oil and gas leasing by issuing a “Notice of Competitive Lease Sale” in April and June 1998, pursuant to 43 CFR 3120.4.

Because they arise from similar facts and raise related questions regarding the propriety of issuing oil and gas leases, these appeals are hereby consolidated.<sup>2/</sup>

STATEMENT OF FACTS

The Forest Service prepared a programmatic Final Environmental Impact Statement (FEIS), entitled “Leasing for Oil and Gas Exploration and Development on

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<sup>1/</sup> The six parcels are: WY-9808-304 (1,949.57 acres in T. 48 N., R. 104 W., Sixth Principal Meridian, Park County, Wyoming); WY-9808-305 (517.09 acres in T. 49 N., R. 104 W., Sixth Principal Meridian, Park County, Wyoming); and WY-9808-307 (360 acres in T. 43 N., R. 107 W., Sixth Principal Meridian, Fremont County, Wyoming); WY-9806-381 (1,751.41 acres in T. 58 N., R. 103 W., Sixth Principal Meridian, Park County, Wyoming); WY-9806-393 (120 acres in T. 43 N., R. 107 W., Sixth Principal Meridian, Fremont County, Wyoming); and WY-9806-401 (1,599.32 acres in Ts. 42 and 43 N., R. 110 W., Sixth Principal Meridian, Fremont County, Wyoming). The parcels are, at times, referred to as the “Brent Creek” (WY-9806-401 and WY-9808-307), “Sheridan Pass” (WY-9806-393), “Line Creek Plateau” (WY-9806-381), and “Pickett Creek” (WY-9808-304 and WY-9808-305) parcels. (Statement of Reasons for Appeal (SOR), dated Nov. 13, 1998, at 12.)

<sup>2/</sup> WOC's appeal, docketed as IBLA 99-37, originally pertained to all six parcels. By letter dated Mar. 5, 2002, however, WOC informed the Board that it wished to withdraw its appeal to the extent that it contested the offering of two parcels (WY-9806-393 and WY-9808-307), and requested partial dismissal “without prejudice.” (Letter dated Mar. 5, 2002, at 1.) BLM has not objected to this request, and it is granted, but with prejudice. Hereafter, apart from including parcels WY-9806-393 and WY-9808-307 as a necessary part of factual recitations, unless otherwise noted, our discussion is applicable only to the four parcels that remain in contention.

Walsh's appeal, docketed as IBLA 99-38, pertained to parcels WY-9808-304, WY-9808-305, and WY-9808-307.

the SNF” (Forest-wide FEIS), in December 1992, to examine the environmental consequences of opening the SNF to oil and gas leasing. BLM acted as cooperating agency in the preparation of the FEIS.

As part of its compliance with section 102 of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332 (2000), and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2000), by letter dated December 3, 1992, the Forest Service requested “formal consultation” with the U.S. Fish and Wildlife Service (USFWS), Department of the Interior, under section 7 of the ESA, 16 U.S.C. § 1536(a)(2) (2000). See 50 CFR 402.02. As required by the regulations implementing the ESA, the Forest Service prepared a Biological Assessment to “evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action.” 50 CFR 402.12(a). The Biological Assessment described the proposed action under the preferred alternative, potential impacts on listed species, and various conservation measures for listed threatened and endangered species and their habitats. A revised copy of that Biological Assessment and the FEIS were transmitted to the USFWS for formal consultation on December 14, 1992. See 50 CFR 402.14.

In June 1993, the USFWS issued a Biological Opinion in which it concurred in the Biological Assessment’s findings that the black-footed ferret, grey wolf, and whooping crane were not likely to be adversely affected by the programmatic decision to open the SNF to oil and gas leasing, whereas the bald eagle, peregrine falcon, and grizzly bear could be affected. The Biological Opinion determined that the proposed oil and gas program was not likely to jeopardize the continued existence of the bald eagle, peregrine falcon, or grizzly bear, provided the mitigation measures and other terms and conditions set forth in the FEIS were implemented. (Biological Opinion at 1-2.) As the context for its examination of the effects of the action, the USFWS stated:

The oil and gas program as administered by the Forest Service is divided into several phases: leasing, exploration, development and production. Actual impacts (destruction/degradation of habitat, disturbance, mortality) to wildlife occurs [sic] in the exploration, development and production stages; however, the policies and protective stipulations to regulate all of these activities, normally outlined at the leasing phase, are being established in the proposed oil and gas leasing plan (i.e. Preferred Alternative).

The Shoshone’s Preferred Alternative does include measures, outlined in the final EIS and BA [Biological Assessment], intended to minimize the impact of the oil and gas program and meet management objectives

for recovery of the grizzly bear. Analysis of the adequacy of these measures as well as the past effectiveness of implementing similar actions, and the degree of implementation proposed in the future, form the basis of this biological opinion. The following discussion addresses implementation of the Shoshone's program, as proposed, and its effects on the peregrine falcon, bald eagle, and grizzly bear.

(Biological Opinion at 14.) <sup>3/</sup>

By Record of Decision (ROD) dated December 11, 1995, the SNF Forest Supervisor approved oil and gas leasing in portions of the SNF, subject to no surface occupancy (NSO), controlled surface use (CSU), and various other appropriate timing and operational conditions and stipulations, and disapproved leasing in the remainder of the SNF. The ROD authorized BLM to proceed with the leasing of certain parcels of land in the areas of the SNF thus made available for leasing. (ROD at 3-4.) The ROD was approved by the Regional Forester, Rocky Mountain Region, on October 10, 1996, and became the Forest Service's final leasing decision.

Before offering any of the parcels at issue for competitive oil and gas leasing, however, BLM requested that the Forest Service consent to leasing SNF lands, as required by the Federal Onshore Oil and Gas Leasing Reform Act, 30 U.S.C. § 226(h) (2000); see 43 CFR 3101.7-1(a) and (c) and 3101.7-2(b). In each case, the Forest Service consented to leasing, subject to specific stipulations governing the timing, location, and extent of oil and gas exploration and development, including NSO and CSU restrictions. In addition, the Forest Service provided a form entitled NEPA Validation & Verification Form for Oil & Gas Leasing (R2-2820-20 (4/94) (NEPA V&V)), which implemented the provisions of 36 CFR 228.102(e)(1). In accordance with the provisions of 36 CFR 228.102(e), the NEPA V&V documents three determinations: that each parcel was administratively available for leasing; that leasing had been adequately addressed in the Forest-wide FEIS; and that there were no significant new circumstances or information, as defined in Council on Environmental Quality (CEQ) regulation 40 CFR 1502.9, requiring further environmental review pursuant to section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (2000).

The ROD was challenged by WOC and other parties in Federal court on February 21, 1997, in Wyoming Outdoor Council v. U.S. Forest Service,

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<sup>3/</sup> The Biological Opinion also noted: "With regard to endangered and threatened species habitats, the following conservation measures, outlined in the BA, will be considered for implementation. However, not all are contained in the mitigation section of the Final EIS and indications are only that they would be considered in implementing the [leasing] program." (Biological Opinion at 4.)

No. 97-0355 (JR) (D.D.C.). WOC and others challenged the Forest Service's interpretation of 36 CFR 228.102(e) and the sequencing of the three procedural conditions that must be met as part of authorizing BLM to offer Forest Service lands for leasing.<sup>4/</sup> WOC appealed the U.S. District Court's decision on November 10, 1997, in Wyoming Outdoor Council v. U.S. Forest Service, No. 97-5317 (D.C. Cir.).

The appeal to the D.C. Circuit was pending in April and June 1998 when BLM proposed to offer various parcels of Federal land for competitive oil and gas leasing, including those at issue here, subject to numerous restrictions on surface occupancy, and the timing, location, and extent of oil and gas exploration and development, and was pending in September 1998 when BLM issued the decisions now before the Board.<sup>5/</sup> Before offering the parcels for lease sale, BLM determined that leasing them was consistent with its June 1987 Lander Resource Management Plan (RMP) and its November 1990 Cody RMP, and that the associated EIS's for those RMP's had adequately addressed the potential environmental impacts of leasing and subsequent oil and gas exploration and development. BLM's conclusion was memorialized in a form captioned "Administrative Determination Documentation" (ADD), which is the BLM counterpart of the Forest Service's NEPA V&V.

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<sup>4/</sup> Plaintiffs in the case argued that the regulation required that the three conditions be met before BLM could be authorized to offer Forest Service lands for leasing, whereas the Forest Service interpreted its regulation as allowing it to first make the Forest Service lands administratively available for leasing, and make the regulatory findings verifying NEPA compliance afterward. On cross-motions for summary judgment, the District Court issued its memorandum opinion on Oct. 16, 1997, in Wyoming Outdoor Council v. U.S. Forest Service, 981 F. Supp. 17 (D.D.C. 1997). The court upheld the Forest Service's interpretation of its regulation as reasonable and entitled to substantial deference by a reviewing court. Id. at 19. In addition, the court upheld the Forest Service's conclusion that the Shoshone FEIS had assessed the full environmental consequences of leasing and was sufficient to allow the Forest Service to thereafter make site-specific decisions. Id. at 20.

<sup>5/</sup> The appeal has since been decided. In Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d 43 (D.C. Cir. 1999), the D.C. Circuit affirmed the District Court. It held that "the point of irreversible and irretrievable commitment of resources and the concomitant obligation to fully comply with NEPA does not mature until leases are issued," id. at 49, and that the Forest Service's interpretation of its regulation is "consistent with one of the reasonable interpretations flowing from the admittedly ambiguous regulatory text" of 36 CFR 228.102(e)(1). Id. at 53.

On June 1 and August 3, 1998, WOC filed two protests <sup>6/</sup> objecting to the proposed leasing of various parcels of land, including those at issue here. In the June 1 protest, with respect to parcels WY-9806-381, -393, and -401, WOC argued that BLM could not lease lands that are the subject of litigation; that BLM could not offer the parcels for lease until the Forest Service complied with applicable regulations and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1614 (2000) and the ESA, and had verified that site-specific effects had been adequately addressed in light of significant new information pertaining to the Canada lynx, grey wolf, grizzly bear, northern goshawk, elk, air quality, water quality, and cumulative effects. As to two BLM-administered parcels (WY-9806-394 and WY-9806-395), WOC argued that BLM's decision to offer the parcels was based on an out-of-date RMP, and that BLM could not offer leases until it consulted with the USFWS regarding WOC's new information. (Ex. 1 to SOR; Ex. A to Answer.)

WOC's August 3, 1998, protest pertained to parcels WY-9808-304, -305, and -307 and advanced essentially the same arguments, contending that BLM could not proceed with the lease offering until the Forest Service had complied with the NFMA and the ESA. (Ex. 3 to SOR; Ex. B to Answer.)

Walsh filed his protest on August 5, 1998, objecting to the proposed leasing in the "Yellowstone region" and to "industrial development." <sup>7/</sup>

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<sup>6/</sup> The June 1, and Aug. 3, 1998, protests by WOC purported to have been filed on behalf of the Greater Yellowstone Coalition, Jackson Hole Conservation Alliance, Wyoming Wildlife Federation, Dubois Wildlife Association, and Wyoming Chapter of the Sierra Club, all of whom are "member" organizations of WOC. (SOR at 1.) None of these organizations expressly joined in WOC's Oct. 14, 1998, notice of appeal from the State Director's two September 1998 decisions dismissing the protests, nor have they signed the SOR or provided any evidence that WOC's attorney is authorized to practice on their behalf before the Board pursuant to 43 CFR 1.3. Thus, we do not recognize them as party-appellants. Wilderness Society, 109 IBLA 175, 176-77 (1989).

<sup>7/</sup> Although Walsh did not identify specific lease parcels, it appears that BLM accepted his protest as pertaining to other, unrelated parcels. In a letter to Walsh dated Aug. 7, 1998, the State Director acknowledged Walsh's interest and enclosed a copy of the decision deferring leasing of those other parcels. However, the letter further advised "[i]f you had a concern with leases issued in the Shoshone National Forest your letter will be forwarded to the Forest Service for response."



As provided by 43 CFR 3120.1-3, BLM conducted two competitive oil and gas lease sales on June 2, and August 4, 1998, respectively.<sup>8/</sup> Competitive bids were submitted for two of the six parcels initially identified in WOC's appeal (WY-9806-393 and WY-9808-307). BLM accepted the bids, and subsequently issued competitive oil and gas leases WYW-145799 and WYW-146470, effective January 1, 1999. In addition, following the competitive lease sales, BLM accepted a noncompetitive oil and gas lease offer for a third parcel (WY-9806-381) and issued lease WYW-145938, effective November 1, 1998. No bids were received for the remaining three parcels, and no noncompetitive leases were issued.

On August 17, 1998, after the competitive lease sales had been conducted, the State Director issued a "Letter of Review and Acceptance of the Bureau of Land Management for the Record of Decision Oil and Gas Leasing on the Shoshone National Forest" (Letter of Review and Acceptance), which adopted the Forest Service's FEIS and the Forest Supervisor's December 1995 ROD.

In his September 3, 1998, decision dismissing WOC's June 1 protest, the State Director observed that the issues relating to Forest Service actions and obligations had been answered by the Forest Service and attached to his decision five documents reflecting the Forest Service's response to the protest. In particular, he referred to the Forest Service's August 6, 1998, letter at 3. That response stated:

Here is our current situation with regard to Canada lynx. Given the recent proposed listing of Canada lynx, we have added the lynx to the T&E lease notice (ROD Appendix A, page 47). Any and all proposed or listed species are covered generally at the leasing stage. Any and all proposed or listed species are protected under ESA at all stages of oil and gas leasing activities, regardless of their status or presence at any previous stage of leasing. The ROD underlines on page 6 that [the] ESA is a non-discretionary item, and the decision maker "retain[s] the authority to withhold consent to lease **or** deny surface use plans of operation in order to meet the demonstrated requirements of threatened or endangered species." The standard Region 2 stipulation applied to all leases notifies the lessee that NEPA for any lease activity could result in operational restrictions, or in disallowing use or occupancy if there would be effects on listed or proposed species (ROD

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<sup>8/</sup> The regulation at 43 CFR 3120.1-3 provides that no action pursuant to 43 CFR Subpart 3120-Competitive Leases, shall be suspended pursuant to 43 CFR 4.21(a) due to an appeal from a decision to hold a lease sale. The authorized officer may suspend the lease sale as to a specific parcel to consider a protest or appeal, but only the Assistant Secretary for Land and Minerals Management may suspend a lease sale. Wyoming Outdoor Council, 156 IBLA 377, 380-82 (2002).

Appendix A, page 16). The Shoshone Endangered or Threatened Species Area Lease Notice articulates the same concept, but states further[:] “If proposed, threatened or endangered species are discovered in the area after any required biological evaluation has concluded, an additional evaluation will be conducted to assess the effects of ongoing or proposed activities on such species. Additional restrictions or prohibitions may be imposed as necessary after consideration of the evaluation conclusions and consultation or conference with the FWS as appropriate.”

We are discussing the needs of lynx as a proposed species with USFWS, and how that relates to our ongoing lease program. For leases that have been processed and sold, it is clear that proposed activities triggering the additional evaluation would consist of any application for a permit to drill and surface use plan of operation. Any receipt of an APD/SUPO would require the use of NEPA and a site-specific decision that considers an assessment of effects on lynx, makes a determination and invites conferencing, if appropriate. The appropriateness would be triggered by a “may affect - likely to jeopardize continued existence of the species” determination.

(Emphasis in original.) The State Director otherwise correctly declined to respond to those arguments which challenged Forest Service actions or decisions. See Colorado Environmental Coalition, 125 IBLA 210, 213-15 (1993). <sup>2/</sup>

As to objections directed to BLM, the State Director responded only that BLM had “prepared and signed a decision that states ‘The Bureau of Land Management (BLM) has reviewed and adopts the Oil and Gas Leasing Record of Decision for the Shoshone National Forest,’ pursuant to the provisions of 40 CFR 1506.3(c),” noting that BLM was a cooperating agency “in the full sense of the term.” However, the protest was sustained insofar as it related to the two BLM-administered parcels (WY-9806-394 and WY-9806-395): “[T]he record was reviewed and BLM will reinstate consultation with the Fish and Wildlife Service concerning the Dubois unit of the Lander Resource Area. [<sup>10/</sup>] In view of the new information concerning the gray wolf and the grizzly bear,” the State Director determined to reject the bid received at the June 1, 1998, competitive sale and refund the monies received for it. (Decision at 2.)

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<sup>2/</sup> We note that 43 CFR 4.410(a) confers appellate jurisdiction over oil and gas leasing and other land use management decisions made by BLM only. Therefore, to the extent that WOC challenges Forest Service actions, we express no opinion. Colorado Environmental Coalition, 125 IBLA at 218.

<sup>10/</sup> BLM had prepared a Biological Assessment and formally consulted the USFWS in connection with the preparation of the Lander RMP. (Lander RMP/FEIS at 137.)

In the September 4, 1998, decision regarding WOC's August 3 protest, the State Director stated that concerns regarding other parcels not at issue here had been dealt with in the July 29, 1998, letter to WOC (appended as Attachment 1). He further stated that on August 7, 1998, the Forest Service had responded to WOC's protest and other issues. That Forest Service response was virtually the same as quoted above from the August 6 Forest Service letter. In addition, he provided a copy of the memorandum opinion issued in Wyoming Outdoor Council v. U.S. Forest Service, 981 F. Supp. 17 (D.D.C. 1997); a copy of a May 28, 1998, response of the USFWS to the June 2, 1998, inquiry of the SNF Forest Supervisor regarding the need to reinitiate consultation; and copies of correspondence dated May 28, and June 26, 1998, from the Forest Service to various environmental groups (Attachment 2). He also provided an SNF "Response to General Protest Letters" dated August 7, 1998 (Attachment 3), and the standard appeals sheet (Attachment 4). He dismissed WOC's protest, advising that a lease for parcel WY-9808-307 would be issued.

Also on September 4, 1998, the State Director issued his decision to Walsh in which he stated only that the Forest Service had responded to his concerns. He appended a copy of the SNF "Response to General Protest Letters" dated August 7, 1998, as Attachment 1. He dismissed the protest and advised that the lease for parcel WY-9808-307 would be issued.

WOC and Walsh filed timely appeals from the State Director's September 1998 decisions.<sup>11/</sup>

### ANALYSIS

#### Walsh's Appeal

We will address Walsh's appeal before proceeding to the merits of WOC's appeal. In his notice of appeal, Walsh contends that the land at issue should be declared "unsuitable" for oil and gas exploration and development, and thus unsuitable for oil and gas leasing, because this does not constitute the land's "highest and best use." According to Walsh, the highest and best use of the land is the "preservation and restoration of the last intact ecosystem in the lower 48 states," an ecosystem that provides actual or potential habitat for the threatened grizzly bear and endangered black-footed ferret. Walsh did not file an SOR within 30 days of filing his notice of appeal as required by 43 CFR 4.412(a), or thereafter.

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<sup>11/</sup> Although he had not done so in his protest, Walsh's notice of appeal specifically identified WY-9808-304, WY-9808-305, and WY-9808-307. He also petitioned for a stay of BLM's decision, which we now deny as moot, having reached the merits of the controversy.

The failure to file an adequate SOR is properly treated in the same manner as a failure to file any SOR under 43 CFR 4.412(c). The appeal will be dismissed where no extension of time to file has been sought or any explanation for the failure to file timely provided. Shogun Oil Ltd., 136 IBLA 209, 212 (1996); Burton A. McGregor, 119 IBLA 95, 98 (1991). To constitute an acceptable SOR, a notice of appeal must affirmatively point out error in the decision challenged. Burton A. McGregor, 119 IBLA at 98. This does not mean that the appellant must persuasively establish that BLM actually committed error in its decision. Instead, the appellant must offer reasons in support of his contention that BLM erred, and thus articulate some basis for the Board to review the propriety of the challenged decision. It must do more than simply assert, in a conclusory fashion, that error was committed. See United States v. Fisher, 92 IBLA 226, 227 (1986).

Apart from broad allegations regarding an alleged worldwide oversupply of oil and gas, the relative insignificance of oil and gas reserves underlying the subject lands with respect to satisfying national demand, and the ecological importance of these lands, Walsh does not present any arguments or offer any evidence in support of his position. He does not refer to any statute, regulation or process which has been violated, or demonstrate how BLM has acted contrary to law by deciding to go forward with oil and gas leasing. To the extent Walsh intends to challenge the determination that SNF lands are “suitable” for oil and gas leasing, such a challenge is clearly untimely. Questions relating to the suitability of the land for oil and gas leasing should have been pursued in the form of a protest filed with the BLM Director when the Cody and Landers RMPs were approved. 43 CFR 1610.5-2. Accordingly, it is appropriate to dismiss Walsh's appeal for failing to submit an adequate SOR.<sup>12/</sup> We now turn to WOC's appeal.

## WOC's Appeal

### I. Arguments of the Parties

On appeal, WOC basically pursues the arguments presented in its protests. More specifically, it is WOC's position that, before lands may be leased, further site-specific analyses are required to address the effects of oil and gas leasing and related activity on the grizzly bear (Ursus arctos horribilis), a listed threatened species; the grey wolf (Canis lupus), a reintroduced species treated in the FEIS as if it had been proposed for listing under the ESA; and the Canada lynx (Lynx canadensis),

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<sup>12/</sup> In addition, Walsh's notice of appeal did not allege that he is likely to be “adversely affected” by the State Director's September 1998 decision to dismiss his protest and go forward with competitive leasing, as required by 43 CFR 4.410(a). Walsh's appeal is subject to dismissal for lack of standing to appeal as well. Laser, Inc., 136 IBLA 271, 273-74 (1996).

a species proposed for listing under the ESA. (SOR at 9-15.) To buttress its position, WOC notes that BLM determined that further consultation with the USFWS was necessary for the Lander Resource Area parcels (WY-9806-394 and -395), suggesting that BLM could not rationally reach a different conclusion for the adjoining “Brent Creek lease area.” <sup>13/</sup> (SOR at 15-16, 18-19.) According to WOC, the numerous stipulations, conditions and lease notices established by the Forest Service, the USFWS, and BLM are not a proper substitute for such further analyses. (SOR at 15.) Similarly, with respect to air quality, WOC questions the adequacy of the air quality lease notice (SOR at 16); it also observes that activities that will further degrade water quality cannot lawfully be authorized (SOR at 17). A number of proposals and actions are listed by WOC as evidence of the cumulative impacts the FEIS failed to evaluate. (SOR at 17-18.)

With regard to the procedure followed in these cases, WOC argues that BLM did not fulfill its own NEPA obligations by preparing and issuing its own ROD, without which there was no NEPA decision on which BLM could base any leasing action. (SOR at 7-8.) WOC acknowledges that the State Director issued the Letter of Review and Acceptance, which purported to adopt the Forest Supervisor's December 1995 ROD, but argues that the Letter of Review and Acceptance was neither timely nor proper under CEQ regulations. (SOR at 8.) Next, WOC argues that BLM could not offer the parcels for leasing until the FEIS is supplemented with site-specific analysis of environmental effects in light of the significant new information to be considered. (SOR at 9.) WOC argues that, absent further consultation with the USFWS and analysis, it was improper to rely upon the FEIS as the basis for proceeding with leasing. (SOR at 16, 18-19.) Lastly, WOC asserts that BLM violated its own Manual by leasing the parcels while they were the subject of pending litigation. (SOR at 19-20.) In summary, WOC challenges the sufficiency of the Forest Service's Forest-wide FEIS as the basis for BLM's decision to issue leases, as well as the propriety of BLM's reliance on that FEIS and the procedure by which it purported to do so. Appellant therefore asks the Board to reverse the State Director's September 1998 decisions, rescind all leases issued, <sup>14/</sup> and comply with section 102(2)(C) of NEPA to rectify alleged inadequacies in the Forest-wide FEIS before undertaking another lease sale. (SOR at 21.)

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<sup>13/</sup> WOC also refers to the “Brent Creek and Sheridan Pass areas” as “integral parts of the Greater Yellowstone Ecosystem” which contain “important wildlife migration corridors for wildlife coming and going from the Absaroka Mountains and Yellowstone National Park to the Wind River and Gros Ventre Mountains to the south.” (SOR at 10.)

<sup>14/</sup> In light of the withdrawal of WOC's appeal as to two leased parcels, the relief requested can apply only to noncompetitive lease WYW-145938 issued for parcel WY-9806-381, effective Nov. 1, 1998, the only other lease issued.

In its Answer, BLM argues that this Board lacks jurisdiction to entertain WOC's ESA arguments, on the theory that to do so requires that we examine the adequacy of the Biological Opinion underlying the Forest Service's decision. (Answer at 2-6.) BLM further asserts that it was appropriate to defer to the USFWS's conclusion that WOC's new information did not trigger reinitiation of consultation pursuant to the ESA, arguing that, under the standard of review prescribed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, et seq. (2000), the decision to do so was neither arbitrary and capricious, nor contrary to law.<sup>15/</sup> (Answer at 6.) BLM further argues that WOC has overestimated the impacts of the project, and that all but 6,000 acres of the 463,000 acres on which exploration will be allowed are protected by adequate lease terms, stipulations, and notices. (Answer at 7-8.) BLM next argues that it fully complied with NEPA, citing the district court decision in Wyoming Outdoor Council v. U.S. Forest Service, 981 F.Supp. 17, and further claims that BLM and the Forest Service took the required hard look at environmental impacts, such that BLM's decision not to issue its own ROD (Answer at 8-11) and failure to specify that litigation was pending constitute harmless error (Answer at 9, 12-13). Finally, BLM notes that the various terms, stipulations, and lease notices are more than adequate to address site-specific concerns. (Answer at 13-18.) It responds to WOC's allegations regarding new information as to endangered species, the adequacy of the FEIS's cumulative impacts analysis, and air and water quality by denying them. (Answer at 18-22.)

## II. Legal Framework for Deciding this Appeal

[1] As we have acknowledged, this Board has no jurisdiction over decisions made by the Forest Service. However, when BLM adopts the FEIS of another agency in lieu of performing its own environmental analysis and relies on it as the basis for an exercise of its own decisionmaking authority, this Board properly may review that FEIS to determine whether BLM's decision is supported by the record, guided by the same principles ordinarily applicable to an FEIS prepared by BLM. Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d at 46, citing Colorado Environmental Coalition, 125 IBLA at 220.

Before issuing an oil and gas lease, and thus irreversibly and irretrievably committing to the exploration and development of the oil and gas resources in the leased lands, section 102(2)(C) of NEPA requires an agency to assess the potential

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<sup>15/</sup> This standard of review applies to judicial review of final Department decisions. 5 U.S.C. § 706(2)(A) (2000). The Board exercises de novo review authority to determine whether the record in a case supports the action taken by BLM. See, e.g., National Wildlife Federation, 145 IBLA 348, 362 (1998); U.S. Fish and Wildlife Service, 72 IBLA 218, 220-21 (1983).

environmental impacts of such exploration and development. Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d at 49; Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Conner v. Burford, 848 F.2d 1441, 1448-51 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); Wyoming Outdoor Council, 156 IBLA 347, 357 (2002); Union Oil Company of California, 102 IBLA 187, 191-93 (1988).

Where environmental impacts are assessed in an EIS, under section 102(2)(C) of NEPA, the adequacy of the EIS must be judged by whether it constituted a “detailed statement” which took a “hard look” at all of the potentially significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (2000); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); see 40 CFR 1502.1; Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1285-86 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973); Colorado Environmental Coalition, 142 IBLA 49, 52 (1997); The Sierra Club, 104 IBLA 76, 83 (1988). The critical question is whether the EIS contains a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action and alternatives thereto. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)); see Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

Thus, to overcome BLM's decision to offer the lands at issue here for oil and gas leasing, WOC must demonstrate, with objective proof and by a preponderance of the evidence, that BLM did not adequately consider a substantial environmental question of material significance to the proposed action, or that it otherwise failed to comply with section 102(2)(C) of NEPA. Colorado Environmental Coalition, 142 IBLA at 52.

[2] We will deal with a threshold argument urged by BLM before turning to the parties' specific arguments. As BLM correctly notes, the Secretary has not delegated authority to this Board to review the merits of USFWS biological opinions. On this ground, BLM contends that this Board has no jurisdiction to entertain WOC's ESA claims. This assertion leaps well beyond the narrow question of authority to review the scientific merits of a Biological Opinion. The ESA imposes an affirmative obligation on all Federal agencies to “utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species” and to “insure that any action authorized, funded, or carried out by such agency \* \* \* is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary \* \* \* to

be critical \* \* \* .” 16 U.S.C. § 1536(a)(1) and (2) (2000). The same obligation is imposed for species which have been proposed for listing. 16 U.S.C. § 1536(a)(4) (2000). This Board clearly has appellate review authority over decisions made by Department officials relating to the use and disposition of public lands and their resources, 43 CFR 4.1(b)(3), including decisions which discharge BLM’s obligations under the ESA. See, e.g., Moffatt County Road Department, 158 IBLA 221 (2003); Headwaters, 157 IBLA 139 (2002); Kendall’s Concerned Area Residents, 129 IBLA 130 (1994); In re Bar First Go Round Salvage Sale, 121 IBLA 347 (1991).

Moreover, CEQ regulations contemplate and provide for compliance with the ESA as an element of complying with NEPA: “To the fullest extent possible, agencies shall prepare draft [EIS’s] concurrently with and integrated with environmental impact analyses and related surveys and studies required by the \* \* \* [ESA] \* \* \* and other environmental review laws and executive orders.” 40 CFR 1502.25(a). Thus, in evaluating whether BLM took the requisite “hard look” at the environmental impacts of a proposed action required by NEPA, it is an entirely proper exercise of the Board’s authority to consider impacts on threatened and endangered species and whether BLM has complied with the mandates of the ESA. It is simply not correct that the adjudication of agency compliance with the ESA, whether as a separate matter or as an important aspect of NEPA compliance, is the same as scrutinizing the scientific bases for a determination in a biological opinion that an action is or is not likely to jeopardize the continued existence of a threatened or endangered species, and we reject BLM’s argument to the contrary. See F. Duane Blake v. BLM (On Reconsideration), 156 IBLA 280 (2000).

### III. Adequacy of the FEIS

We think it necessary to commence our discussion with an assessment of the FEIS to establish the factual context for our consideration of appellant’s specific contentions.

#### A. Threatened and Endangered Species

We begin with the adequacy of the FEIS in light of what was known about the presence of the grizzly bear, grey wolf, and Canada lynx at the time the FEIS was prepared. In the case of the grey wolf, WOC asserts that wolves “inhabit the areas in and around” two of the parcels in the SNF, in Fremont County, one of which remains at issue (WY-9806-401). (SOR at 11.) The FEIS acknowledged possible sightings in the SNF, none of which had been verified by the date the FEIS was issued as final. The USFWS therefore determined it would investigate to confirm the status of the grey wolf. (FEIS at S-8; III-35.) WOC cites the ROD at 6, which states that the grey wolf and black-footed ferret are not known to be present in the SNF, but acknowledges that prey for the species are present in the forest. The ROD further



states: “When it is determined these species inhabit the Forest, additional analysis will be conducted and the Forest Plan will be amended as necessary.” The Forest Supervisor determined to require a Lease Notice for threatened and endangered species which emphasizes the lessee’s obligation to protect such species and their habitat. Despite uncertainty regarding the presence of grey wolves, the Lease Notice lists the species. The USFWS committed to investigate the status of wolves in the SNF, and to that extent WOC’s argument on this point is moot.

With respect to the grizzly bear, our review of the FEIS shows that the Forest Service took the requisite hard look at environmental impacts that NEPA mandates. See, e.g., FEIS at III-36; IV-82; IV-86 to 87; IV-90 to 91; IV-93 to 95; VI-23; response to comment 19-16; response to comment 44-1, VI-37. Of particular note, the FEIS observes that definitions contained in Interagency Guidelines <sup>16/</sup> relevant to managing grizzly bear habitat in the Greater Yellowstone Area were revised in 1986, so that Management Situation 2 <sup>17/</sup> now describes habitat resources that “either are unnecessary for survival and recovery of the species, or the need has not yet been determined but habitat resources may be necessary.” (FEIS at III-36.) Noting that the definition of Management Situation 3 had not changed, the FEIS nonetheless recognizes that the presence of the bears in Situation 3 areas is increasing. Id. In particular, however, the FEIS states:

The objective is to include within each recovery zone an area large enough and of sufficient habitat quality to support a recovered grizzly population. Verified reports of grizzlies occurring within 10 miles of the recovery zone would be considered in determining population

status. The Forest portion of the currently identified recovery zone consists of approximately 1,250,000 acres.

Id.

The FEIS provides that surface occupancy is to be prohibited on specific areas important to threatened and endangered species, including grizzly bear Management Situation 1 sites and feeding sites. (FEIS at S-16.) In the balance of the bear recovery zone, timing limitations, coupled with a Lease Notice, will be imposed for “the balance of recovery zone and known or suspected grizzly use areas outside the

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<sup>16/</sup> Formerly known as the “Guidelines for Management Involving Grizzly Bears in the Greater Yellowstone Area.” See FEIS at III-36 and Literature Cited, L-1.

<sup>17/</sup> Management Situations 1, 2, and 3 in descending order describe habitat resources that are more or less important to the survival and recovery of the species. Thus, Management Situation 1 pertains to the habitat areas that are most critical to the grizzly bear’s survival and recovery.

recovery zone as well as all other identified habitats of threatened or endangered species.” Id. The matrix of lease provisions, conditions, and stipulations compared by alternative appears in the FEIS at S-8, and a similar comparison of operating conditions imposed to mitigate impacts is provided as Table 3 at S-12.

Finally, we acknowledge that the FEIS is silent as to the Canada lynx, but we find no fault in this, because the presence of the species in the affected area apparently was not known or suspected at the time the analysis was performed. We further address Canada lynx below.

### B. Air and Water

The FEIS similarly examined impacts on air (FEIS at III-9; IV-31 to 33) and water resources (FEIS I-9; II-4; II-58; III-29; IV-66 to 79). For air impacts, the FEIS discussed mitigation as part of the alternatives analysis, but for each such alternative, determined to regulate air quality in accordance with State law and to “use standard mitigation practices to meet NAAQS [National Ambient Air Quality Standards] and Best Available Control Technology to protect Class I areas.” (FEIS at S-9.) Monitoring is required, and development activities will be authorized through Wyoming’s Prevention of Significant Deterioration permitting process. (FEIS at IV-32 to 34.)

For impacts on water resources, described at length at IV-67 to 73, the FEIS classified soil and water hazard areas as high, moderate, or low, and utilized a mix of lease stipulations and conditions to mitigate potential impacts on water, based on the level of hazard involved. See FEIS at S-8; S-16. However, while the FEIS readily acknowledged that further analysis at the project level is necessary, it also observed that high hazard areas are “likely to be inoperable ground.” (FEIS at IV-74.) If it is determined during project-specific analysis of proposed surface-disturbing activity that there are areas of operable ground and that direct and indirect impacts can be mitigated, the project may be permitted. According to the FEIS, a Lease Notice to that effect will be issued. As a result of these conditions, high hazard areas are subject to what is termed a “technical No Surface Occupancy stipulation.” Id. In similar fashion, moderate hazard areas will be protected by the use of CSU and timing restrictions, while low hazard areas were deemed to be adequately protected by standard lease terms. Id. at IV-74 to 75.

In summary, we find that the FEIS’s analysis of potential impacts on the grizzly bear, grey wolf, air quality, and water resources constituted the requisite hard look at environmental consequences that NEPA demands. WOC thus has not shown, by a preponderance of the evidence, that the Forest Service’s FEIS failed in any material way to scrutinize the significant environmental consequences of its decision to allow oil and gas leasing in the SNF. Kleppe v. Sierra Club, 427 U.S. at 410 n.21.

C. Cumulative Impacts

[3] An agency is required to consider the potential cumulative impacts of a proposed action with those of any other past, present, and reasonably foreseeable future actions. 40 CFR 1508.7; see Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). This the FEIS did. It specifically addressed the likely cumulative impacts of oil and gas exploration and development occasioned by leasing the parcels and other lands in the SNF together with other reasonably foreseeable future actions, including most mentioned by WOC. (FEIS at IV-97 to 109, Appendix D.) What must be shown is a likely “interaction” in some manner between or among the proposed action and other projects, because of geographic proximity and/or other factors, which gives rise to a potential cumulative impact which BLM is then required to address. Wyoming Outdoor Council, 147 IBLA 105, 109 (1998). Though geographic proximity may contribute to the likelihood of some kind of interaction, the likelihood of a cumulative impact cannot be demonstrated simply by showing geographic proximity.

In this case, WOC has identified projects and activities that conceivably could interact with oil and gas leasing in the SNF in general, but has not identified any cumulative impact likely to result from this potential interaction that was not addressed in the FEIS, or any such impact for the lease that remains at issue in particular. Thus, in Appendix D to the FEIS, the Forest Service endeavored to enumerate “those activities, developments or events, that cumulatively, have the potential to change the biological or physical character of a given area.” (FEIS at IV-97.) These were termed “sources of change,” *id.*, and were identified as mining activities, existing roads, poor condition upland range, timber clearcuts and partial cuts, site conversions (deforestation), heavy use sites such as ski areas and campgrounds, and timber sales, and were analyzed in terms of on-forest and off-forest impacts.

Contrary to WOC’s claim, it is not correct that the Forest Service failed to analyze cumulative impacts. Indeed, virtually every activity and project to which appellant points (SOR at 17-18) is identified: timber sales in the Brent Creek and other areas, the Togwotee Pass Highway reconstruction, projects and activities in Bridger-Teton National Forest, and oil and gas development considered as both reasonably foreseeable scenarios and presently productive oil and gas fields. Based on concerns expressed during the EIS scoping period, the Forest Service identified threatened and endangered species; recreation, visual quality and air quality, grouped together; and watersheds as “targets of concern” for purposes of its cumulative impacts analysis. The watershed cumulative impacts analysis is set forth at D-7 to D-24; threatened and endangered species are treated at D-25 to 34; and the

concerns of recreation, visual quality, and air quality are analyzed as a group at D-35 to 39. BLM developed the reasonably foreseeable development scenarios described in detail in Appendix A.

Given WOC's acknowledgment of the environmental analyses prepared in connection with the activities to which it points, such as the EIS's for the Brent Creek timber sale, the Togwotee Pass Highway reconstruction, the EA's for the Hudson Oil Company application for permit to drill, and the Double Cabin timber sale, appellant's assertion that the FEIS failed to analyze cumulative impacts from development of the leased parcels and other projects and activities in the area, without showing with particularity how and in what manner the analysis actually performed is deficient, is rejected as unpersuasive. Accordingly, we find no violation of section 102(2)(C) of NEPA on this basis.

#### IV. Site-Specific Impacts and Supplementation of the EIS

What remains of WOC's substantive arguments is its contention that the FEIS must be supplemented to analyze site-specific impacts.<sup>18/</sup> In fact, what lies at the heart of this assertion are WOC's claims with respect to the emergence of new information, which appellant characterizes as "significant," and what procedural obligations it triggers, if any, under NEPA or the ESA. Insofar as this new information relates to the grizzly bear, grey wolf, and lynx, we will deal with it below in the context of appellant's ESA claims.

##### A. Air and Water Resources

To the extent the new information pertains to air and water resources, we cannot agree that WOC has come forward with significant new information. Regarding air quality, appellant cites the October 28, 1996, joint letter from the Regional Foresters of the Rocky Mountain and Intermountain Regions to the Wyoming Department of Environmental Quality (WDEQ) to support WOC's conclusion that "emissions from oil and gas projects proposed upwind of the Bridger Wilderness (e.g., Jonah II) and Washakie and Fitzpatrick Wildernesses (e.g., Lost

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<sup>18/</sup> We note that the argument was rejected by the District Court in Wyoming Outdoor Council v. U.S. Forest Service, 981 F. Supp. at 20. The District Court deferred to the Forest Service's contention that the FEIS assessed the full environmental consequences of the leasing decision and that it was sufficient to allow site-specific decisions. The D.C. Circuit did not address the argument, holding only that WOC's NEPA claims were premature until leases were actually issued, after which the Forest Service could undertake additional efforts to comply with its NEPA obligations. Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d at 50.

Cabin gas plant expansion) threaten to exceed the Forest Service's limits of acceptable change for visibility and possibly for lake chemistry." (SOR at 16.) This observation is followed by appellant's description of the Air Quality Lease Notice as nothing more than notification of existing law regarding air quality. It is correct that the October 1996 letter identified the "limits of acceptable change the USDA Forest Service will use to evaluate monitored or predicted air pollution impacts to visibility and aquatic ecosystems in the Wyoming Wildernesses." (Letter at 1, included in Ex. 1 to SOR.) That letter expressly noted, however, that the "level of protection" thus established "should allow the Forest Service and the State of Wyoming to meet the provisions of the national visibility goal identified in Section 169(a) of the Federal Clean Air Act," and that these limits could be modified as the science changed. *Id.* at 2. We reject WOC's characterization of the Lease Notice as an ineffective gesture and its dismissal of the primary role played by WDEQ in regulating air quality and permitting emissions which affect air quality.

We find WOC's assertions regarding water quality to be equally general and ill-founded. Appellant cites the October 1996 joint letter to WDEQ to bolster its assertion that the "EIS did not consider whether impacts from oil and gas development would exceed these limits [of acceptable change]" and the suggestion that the FEIS "authorizes activities that will further degrade water quality." (SOR at 17.) Again, it is correct that the October 1996 joint letter set two limits of acceptable change for "water chemistry in aquatic ecosystems" by reference to the acid-neutralizing capacity of the water body involved. However, the Regional Foresters stated that those "levels of protection should protect even the most sensitive aquatic ecosystems from unacceptable changes." (Letter at 2, included in Ex. 1 to SOR.) Appellant's claims ignore the text of the FEIS and the mitigation strategies reflected by various lease conditions and stipulations, and thus we conclude that the information is neither "significant" within the meaning of 40 CFR 1508.27, nor new.

The primary mission of section 102(2)(C) of NEPA is to ensure that an agency is fully informed regarding the environmental consequences of a proposed action as it exercises its discretion to decide whether to offer lands for oil and gas leasing pursuant to the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (2000); 40 CFR 1500.1(b) and (c); Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1285-86 (1<sup>st</sup> Cir. 1996); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). As the court stated in County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978):

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of

harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

WOC clearly has failed to identify a site-specific impact on air or water quality that was not considered in the EIS.

#### B. Threatened and Endangered Species

WOC is correct that, under 40 CFR 1508.27, an adverse effect on a threatened or endangered species may be considered a significant impact. Oregon Natural Resources Council, 116 IBLA 355, 363 (1990). However, the mere fact that a listed species is known to be present in or near an area proposed for oil and gas leasing does not establish that there is likely to be any adverse impact or that it will be significant. The CEQ defines “significance” in terms of both context and intensity or severity of an impact, and specifically includes as a factor in evaluating intensity the “degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the [ESA].” 40 CFR 1508.27(b)(9). Accordingly, we now consider whether appellant has come forward with significant new information regarding certain threatened and endangered species, and if so, what further action is required under NEPA or the ESA.

In the case of Canada lynx, WOC asserts that “[t]here has been no analysis of impacts on lynx in the Brent Creek area (parcels WY-9806-401, WY-9808-307), or anywhere else on the SNF, in the EIS or in the biological evaluation for the EIS.” (SOR at 10.)

As to wolves, WOC states that “[t]he Washakie wolf pack chose an area just downslope from the Brent Creek leases in the Dunoir Valley as the first known wolf den site outside Yellowstone National Park,” and now that they have been observed in the SNF, “additional analysis must be conducted to examine the impacts of oil and gas [sic] on the wolf.” (SOR at 11.)

Lastly, with respect to the grizzly bear, WOC asserts that all of the SNF parcels are now considered “occupied grizzly bear habitat.” (SOR at 12.) Appellant does not contend that the parcels are now considered to be population centers and habitat needed for survival and recovery of the species, or otherwise critically important for the grizzly bear. Compare FEIS at III-36, IV-82 to IV-83. Instead, it notes that “the SNF has not analyzed the impacts of oil and gas on the bears in the Brent Creek and Sheridan Pass areas.” (SOR at 12.)

The test is whether significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts has emerged since the EIS was prepared. 40 CFR 1502.9(c). As the Supreme Court stated in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989):

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. \* \* \* Application of the “rule of reason” \* \* \* turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: \* \* \* [I]f the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. [Footnotes omitted, emphasis added.]

See State of Wisconsin v. Weinberger, 745 F.2d 412, 418, 420 (7th Cir. 1984); Wyoming Independent Producers Association, 133 IBLA 65, 85 (1995).

We note that no specific impacts on any of the three species are alleged, and thus we have no evidence or particularized argument that any such impacts are new or likely to be significant. As a result, we find that appellant’s information regarding the wolf and grizzly bear does not meet the standard prescribed in Marsh v. Oregon Natural Resources Council, *supra*.

As WOC pleads the issue, parcel WY-9806-401, and arguably parcel WY-9808-307, are most relevant to the presence of the grey wolf in the SNF. However, neither of these parcels was leased, so that the situation is as it was before the lease sales were held. We nonetheless note that the FEIS anticipated the possibility that wolves could come into the project area (FEIS at III-35), and, as WOC acknowledges, the ROD explicitly provides that additional analysis will be conducted when it is determined that grey wolves inhabit the SNF. When informally consulted about the wolf, the USFWS indicated that investigation to confirm its presence in the SNF was necessary, and we have no reason to doubt that the investigation has been or will be conducted.

Although WOC generally argues that all of the SNF parcels are occupied grizzly bear habitat, its more specific allegations implicate only parcels WY-9808-304 and WY-9806-381 of those not withdrawn by WOC. Parcel WY-9808-304 was not leased. With regard to WY-9806-381, as demonstrated above, the FEIS provided for the occurrence of grizzly bears outside Management Situation 1 and the recovery zone: “Verified reports of grizzlies occurring within 10 miles of the recovery zone would be considered in determining population status. The Forest portion of the

currently identified recovery zone consists of approximately 1,250,000 acres.” (FEIS at III-36.) Indeed, the FEIS defines the “balance of recovery zone” as Management Situations 2 and 3: “In conjunction with situation 1 habitat (which describes the grizzly bear recovery zone) situations 2 and 3 represent an area currently believed to be large enough and of sufficient habitat quality to support a recovered grizzly bear population.” (FEIS Glossary at 3.) Appellant has not shown that the information about the presence of the grizzly bear in and near the “Brent Creek and Sheridan Pass areas,” if it is new, shows that the decision to open the SNF to oil and gas leasing will affect the quality of the human environment in a significant manner or to a significant extent not already considered. We therefore conclude that the information regarding the grizzly bear is not significant within the meaning of the CEQ regulation.

The Canada lynx is a different matter, however, because the species was not mentioned in the Forest Service’s Biological Assessment or in the USFWS Biological Opinion, as its presence in the SNF was not known or suspected, and accordingly, the species also was not mentioned in the FEIS. WOC contends that the new information is such that “BLM must re-initiate [sic] formal consultation and must confer with the USFWS before consenting to lease.” (SOR at 18-19.) <sup>19</sup>

BLM responds that it relied on the Biological Opinion’s conclusion that the proposed oil and gas leasing program was not likely to jeopardize the continued existence of the grizzly bear (Answer at 3), and properly relied upon correspondence between the USFWS and the Forest Service in which the USFWS concurred in the Forest Service’s conclusion that there was no need to reinitiate consultation on the basis of appellant’s new information (Answer at 3-4). <sup>20</sup>

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<sup>19</sup> In arguing that BLM must “re-initiate” consultation, it is not clear whether WOC contends it is BLM’s Biological Assessment and consultation in connection with the preparation of the Lander RMP/EIS, which relates to parcels not involved here, or the Forest Service’s Biological Assessment and formal consultation for the SNF FEIS, in which BLM participated as a cooperating agency, to which BLM’s perceived obligation to “reinitiate formal consultation” relates.

<sup>20</sup> That correspondence concerned appellant’s information regarding the grizzly bear and grey wolf. BLM takes a different position on appeal, but it is clear that the State Director did not purport to rely on that correspondence as the basis for dismissing WOC’s protests as they related to the exercise of BLM’s leasing authority. The conclusion that there was no need to reinitiate formal consultation as to the grizzly bear and grey wolf hardly disposed of appellant’s contentions regarding the Canada lynx.



[4] After litigation culminating in a settlement agreement dated February 8, 1998, the Canada lynx was proposed for listing on July 8, 1998, and was listed as a threatened species by the USFWS, effective April 24, 2000. <sup>21/</sup>

According to WOC, the Canada lynx is or may be present in the Brent Creek area or in or near the Brent Creek parcel. The evidence most persuasively places the lynx in parcel WY-9806-307 (the Brent Creek parcel), but WOC withdrew its appeal regarding that parcel. Assuming that the “Brent Creek area” properly includes all of Fremont Count lying in the SNF, it appears that only parcels WY-9806-393 and -401 could possibly be implicated. However, WOC withdrew its appeal regarding WY-9806-393 as well. Parcel WY-9806-401 was offered in the June 1998 sale, before the lynx was proposed for listing on July 8, 1998, and therefore no conferencing obligation under the ESA had matured at that point. See 50 CFR 402.10(a). In any event, no competitive bids were received for WY-9806-401, and no noncompetitive lease was issued for that parcel. BLM’s refusal to sustain WOC’s protests as they related to conferencing obligations under the ESA with respect to the Canada lynx thus was correct. Should BLM determine to again offer parcel WY-9806-401 for sale, it would be required to comply with the ESA’s requirements for listed species.

[5] Although BLM was not required to confer with the USFWS about the lynx under 50 CFR 402.10, it did have obligations under the BLM Manual. Section 6840 of the Manual provides policy and guidance for the conservation of special status species, including candidate species, i.e., species being considered for listing as threatened or endangered. The Canada lynx was a candidate species in May 1997. 63 FR 36994, 37001 (July 8, 1998). Section 6840.06C of the Manual (Release 6-116, 9/16/88) provided that “BLM shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species and T/E [threatened or endangered].”

Specifically, BLM was required to “[d]etermine the distribution, abundance, reasons for current status, and habitat needs for candidate species occurring on lands administered by BLM, and evaluate the significance of lands administered by BLM or actions in maintaining those species.” 6840.06C.1. It was also required to request technical assistance from the USFWS, and any other qualified source, such as the

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<sup>21/</sup> The initial comment period expired on Sept. 30, 1998. 63 FR 36994 (July 8, 1998.) The comment period was extended twice by request. The 1-year period allowed to make the final determination on a listing action was extended 6 months. 64 FR 36836 (July 8, 1999). An additional 38-day comment period was allowed. The species finally was listed as a threatened species on Mar. 24, 2000. 65 FR 16052.

Wyoming Game and Fish Department, on any planned action that might contribute to the need to list a candidate species. 6840.06C.3; 6840.2.B. <sup>22/</sup> If, as in this case, a candidate species exists in an area that would be affected by a BLM decision, BLM is required to implement these policies. See Native Ecosystems Council, 139 IBLA 209, 219 (1997).

From the record before us, it does not appear that BLM fulfilled its obligations under 6840.06C of the BLM Manual. Under these circumstances, we would normally set aside a BLM decision and remand the matter. The Wilderness Society, 106 IBLA 46, 55-56 (1988). In this case, however, WOC withdrew its appeal as to two parcels that were leased in the Brent Creek area where evidence of the lynx was found, and a third parcel was not leased. In light of the subsequent listing of the species, BLM's

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<sup>22/</sup> The current version of Part 6840.06(C) of the Manual, Release 6-121, Jan. 19, 2001, provides:

C. Candidate Species. Consistent with existing laws, the BLM shall implement management plans that conserve candidate species and their habitats and shall ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for the species to become listed. Specifically, BLM shall:

1. In coordination with FWS \* \* \* determine, to the extent practicable, the distribution, population dynamics, current threats, abundance, and habitat needs for candidate species occurring on lands administered by the BLM; evaluate the significance of lands administered by the BLM or actions undertaken by the BLM in maintaining and restoring those species.
2. For candidate species where lands administered by the BLM or BLM authorized actions have a significant effect on their status, manage the habitat to conserve the species by:
  - a. Ensuring candidate species are appropriately considered in land use plans (BLM 1610 Planning Manual and Handbook, Appendix C).
  - b. Developing, cooperating with, and implementing range-wide or site-specific management plans, conservation strategies, and assessments for candidate species that include specific habitat and population management objectives designed for conservation, as well as management strategies necessary to meet those objectives.
  - c. Ensuring that BLM activities affecting the habitat of candidate species are carried out in a manner that is consistent with the objectives for managing those species.
  - d. Monitoring populations and habitats of candidate species to determine whether management objectives are being met.
3. Request technical assistance from the FWS \* \* \* and other qualified sources, on any planned action that may contribute to the need to list a candidate species as threatened or endangered.

failure to comply with its Manual, while real, is without practical consequence, at least in this case. Of course, if BLM determines to offer any parcels where the lynx occurs in the future, it will be required to comply with the ESA's requirements for listed species.<sup>23/</sup>

#### V. WOC's Procedural Claims

WOC contends that BLM acted in violation of section 102(2)(C) of NEPA and its implementing regulations by offering the six parcels of land for oil and gas leasing because BLM's April and June 1998 decisions to offer the parcels were not supported by a separate BLM ROD at the time they were issued. (SOR at 7-9; Reply at 4-5.) WOC argues, moreover, that the State Director's adoption of the Forest Service's ROD did not comply with the statute and regulations, because it was not BLM's "own ROD," and it was issued after BLM had offered these lands for lease. (SOR at 7, 8.) Thus, without a ROD to support a leasing decision, WOC argues, BLM had no authority to sell the leases. (Reply at 7.)

A Federal agency is required by section 102(2)(C) of NEPA to undertake its own comprehensive analysis of the potential environmental impacts of a Federal action which it proposes to take, and cannot wholly defer to an analysis performed by another agency. State of Idaho v. Interstate Commerce Commission, 35 F.3d 585, 595-96 (D.C. Cir. 1994); Anacostia Watershed Society v. Babbitt, 871 F. Supp. 475, 483-86 (D.D.C. 1994); Colorado Environmental Coalition, 125 IBLA at 215-16, 220. This does not preclude the agency from adopting an EIS prepared by another agency in lieu of preparing its own EIS, especially where it cooperated in the preparation of the EIS. Anacostia Watershed Society v. Babbitt, 871 F. Supp. at 485. Indeed, it is expressly permitted by 40 CFR 1506.3(c). See Colorado Environmental Coalition, 125 IBLA at 220; California Wilderness Coalition, 98 IBLA 314, 319 n.7 (1987). The adopting agency must perform its own "independent review," 40 CFR 1506.3(c), however, and determine for itself that the EIS adequately addresses all of the likely significant environmental impacts. In other words, it must accept responsibility for scope and content of the EIS. State of North Carolina v. Federal Aviation Administration, 957 F.2d 1125, 1130 (4<sup>th</sup> Cir. 1992).

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<sup>23/</sup> Consistent with 50 CFR 402.16, we note that the Biological Opinion provides that reinitiation of formal consultation is required where discretionary Federal involvement or control over the action has been retained or is authorized by law and, among other things, a new species is listed or critical habitat is designated that may be affected by the action. (Biological Opinion at 33.)

After environmental review pursuant to section 102(2)(C) of NEPA, an agency is required to issue “a concise public record of decision.” 40 CFR 1505.2. CEQ guidance states that, following an EIS, a cooperating agency with jurisdiction by law over part of the proposed action “will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions.” 46 FR 18026, 18035 (1981). Additionally, BLM’s NEPA Handbook, H-1790-1, at III-7 states that BLM “must prepare its own ROD” when it is a cooperating agency in the preparation of an EIS. (BLM Manual (Rel. 1-1547, Oct. 25, 1988.))

The vehicle chosen by the State Director to fulfill these requirements was a one-page document:

LETTER OF REVIEW AND ACCEPTANCE  
OF THE BUREAU OF LAND MANAGEMENT  
for the  
RECORD OF DECISION  
OIL AND GAS LEASING ON THE SHOSHONE NATIONAL FOREST  
Fremont, Park, Hot Springs, Sublette, and Teton  
Counties in Wyoming

The Letter of Review and Acceptance stated the following:

The Wyoming [BLM] has reviewed and adopts the Oil and Gas Leasing [EIS] and Record of Decision [ROD] for the Shoshone National Forest, pursuant to the provisions of 40 CFR 1506.3(c). \* \* \* The EIS sufficiently addresses all concerns to allow BLM to issue oil and gas leases in the Shoshone National Forest in compliance with [NEPA] regulations, and subject to further site-specific environmental analysis.

\* \* \* \* \*

The EIS and ROD will not be recirculated because BLM participated in its development, analyses, public involvement and distribution. The BLM finds, after independent review of the DEIS [Draft EIS] and FEIS, that its comments and concerns have been satisfied. Further, BLM finds that the FS ROD adequately describes the rationale for not selecting the Environmentally Preferred Alternative. Finally, BLM finds that the EIS provides adequate Reasonably Foreseeable Development scenarios, and that the EIS meets BLM Supplemental Program Guidance requirements for oil and gas leasing.

\* \* \* \* \*

[5] We look beyond the style and format of the Letter of Review and Acceptance to consider its substantive content in light of CEQ regulatory requirements. As an initial matter, we note that WOC offers no evidence that BLM failed to independently determine and assure itself that the likely significant environmental impacts of leasing the six parcels and related oil and gas exploration and development had been adequately considered. In contrast, the record shows that BLM had actively and meaningfully participated in the NEPA process, so that it had actual, substantive knowledge of the major issues considered. Moreover, BLM had previously prepared an EIS to support each of the RMP's for the Lander and Cody Resources Areas involved, and these also had fully considered the impacts of oil and gas leasing in the area. For the reasons enumerated in the discussion of WOC's substantive claims, we are satisfied that the FEIS took the requisite hard look at environmental consequences, so that BLM's decision to adopt the FEIS was not irrational, inappropriate, or unjustified. In these circumstances, we decline to assume that BLM's averment is specious or false. Instead, we find that the Letter of Review and Acceptance adequately achieves the purpose and intent of the CEQ regulations relative to adoption of an EIS by a cooperating agency.

[6] It is true, however, that the State Director's August 17, 1998, Letter of Review and Acceptance had not been issued when BLM decided in April and June 1998 to offer the six parcels for competitive leasing and then undertook sales in June and August 1998. Until a public record of decision is issued, an agency is prohibited from taking an action concerning the proposal which would either have an adverse environmental impact or limit the choice of reasonable alternatives. 40 CFR 1506.1(a); State of Idaho v. Interstate Commerce Commission, 35 F.3d at 595-96; Anacostia Watershed Society v. Babbitt, 871 F. Supp. at 483-86; Colorado Environmental Coalition, 125 IBLA at 215-16, 220.

The "issuance of a lease is an irrevocable commitment," affording the lessee the "right to develop [his] lease." Conner v. Burford, 848 F.2d at 1448-51; Union Oil Company of California, 102 IBLA at 191-93. That commitment does not occur when Federal lands are offered for competitive lease, or even once competitive bids have been submitted and the sale has taken place. While BLM is obligated by 43 CFR 3120.5-3(b) to award a lease to the "highest responsible qualified bidder," when it is determined that leasing would have unacceptable environmental impacts, BLM can decide not to issue a lease after bids have been submitted. William C. Francis, 124 IBLA 119, 120 (1992). Here, BLM had not issued any lease or otherwise committed to the exploration or development of the lands at issue as of August 17, 1998, when the Letter of Review and Acceptance was issued. There was therefore no violation of 40 CFR 1506.1, which establishes the limitations on actions that can be taken during the NEPA process, because BLM had not taken any action "which would have an adverse environmental impact or limit the choice of reasonable alternatives."

WOC's final procedural contention is that BLM was precluded from offering for lease and thereafter leasing the subject parcels because there was then pending an appeal from the Federal district court's October 16, 1997, decision in Wyoming Outdoor Council v. U.S. Forest Service, No. 97-0355 (JR) (D.D.C.), which concerned the propriety of the Forest Service's December 1995 ROD authorizing leasing in the SNF. (SOR at 8, 19-20.) As support, appellant relies on a directive in BLM's Oil and Gas Adjudication Handbook (BLM Manual, Handbook H-3101-1 (Rel. 3-308 (Feb. 2, 1996)) which states:

Lands which are the subject of injunction orders or court decisions affecting leasing which are under appeal cannot be leased until final decisions are rendered by the court, unless other specific direction is provided by the court. Potential lessees (competitive bidders or noncompetitive lease offerors) are to be notified that the oil and gas parcels will be held in suspension until resolution of the litigation. [Emphasis added.]

(Oil and Gas Adjudication Handbook at 3.)

We have held that the Oil and Gas Adjudication Handbook directive binds BLM, although it is not binding on the Board. Utah Wilderness Association, 134 IBLA 395, 397 n.3 (1996); Pine Grove Farms, 126 IBLA 269, 276 n.6 (1993). WOC therefore is correct that, according to the Oil and Gas Adjudication Handbook, H-3101, Issuance of Leases, further action regarding lands subject to an injunction or court order affecting "leasing" should have been suspended pending resolution of the litigation. Potential lessees should have been notified of the suspension, and if leases had been issued when the injunction or order was issued, those leases should have been suspended as well. But nothing in the Manual specifies cancellation of a lease for failure to comply with this provision of Handbook H-3101. The obvious intention of the provision is to ensure that the Department takes no action which could constitute contempt of court or jeopardize affected parties. Moreover, WOC was not prejudiced by BLM's failure to suspend leasing, because the Forest Service's interpretation ultimately was upheld in court, and in due course the suspension would have been lifted pursuant to that judgment.

## VI. Conclusion

In summary, we find that WOC has not carried its burden of demonstrating by a preponderance of the evidence, with objective proof, that BLM failed to adequately consider a substantial environmental problem of material significance to the proposed action, or otherwise failed to comply with section 102(2)(C) of NEPA, nor has appellant shown a violation of the ESA. WOC's procedural claims are rejected for the reasons stated.

To the extent they have not been expressly addressed in this opinion, WOC's other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Walsh's appeal from the State Director's September 4, 1998, decision dismissing his July 27, 1998, protest to BLM's decision proposing to offer three parcels for competitive oil and gas leasing, is dismissed for lack of an adequate SOR. The State Director's September 3, and 4, 1998, decisions dismissing WOC's June 1, and August 3, 1998, protests of BLM's decisions proposing to offer parcels for competitive oil and gas leasing are affirmed.

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T. Britt Price  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge